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No. 94-1902

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1995

FRANCISCO ROBERTO FAUSTO-RENDON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner waived his right to appeal his sentence in his plea agreement.

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OPINION BELOW

The order of the court of appeals (Pet. App. 1A-2A) is unpublished, but the judgment is noted at 46 F.3d 1146 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1995. The petition for a writ of certiorari was filed on May 1, 1995 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of Arizona to pos-

session of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). On May 31, 1994, he was sentenced to 36 months' imprisonment. Three weeks later, the government filed a motion to correct petitioner's sentence. The district court granted the motion and resentenced petitioner to 60 months' imprisonment. The court of appeals dismissed petitioner's appeal. Pet. App. 2A.

1. Petitioner pleaded guilty to possession of approximately 985 pounds of marijuana with intent to distribute it. The plea agreement contained a 60-month cap on incarceration, and petitioner agreed to waive "all rights to appeal." Plea Agreement ¶¶ 3, 5.

Under 21 U.S.C. 841(b)(1)(B)(vii), the mandatory minimum sentence for a violation of Section 841(a)(1) involving more than 100 kilograms of marijuana is 60 months' imprisonment. The government did not move for departure below the statutory minimum. Nevertheless, on May 31, 1994, the district court sentenced petitioner to 36 months' imprisonment, without making any findings to support a departure below the statutory minimum. Gov't C.A. Br. 4, 8.

2. On June 22, 1994, the government filed a motion to correct petitioner's sentence, pointing out that the statute required a 60-month minimum sentence. After holding a hearing on the government's motion, the district court granted the motion and, on August 4, 1994, issued an amended judgment imposing a sentence of 60 months' imprisonment. Gov't C.A. Br. 4.

3. On appeal, petitioner claimed that the district court erred in granting the government's motion to correct his sentence because that motion was not filed within seven days of the imposition of the original sentence, as required by Fed. R. Crim. P.

35(c). Pet. App. 2A. In response, the government argued that the court of appeals lacked jurisdiction because petitioner had waived his right to appeal in his plea agreement. Gov't C.A. Br. 6.

The court of appeals agreed with the government that the express language of the plea agreement waived petitioner's right to appeal his sentence, and the court dismissed petitioner's appeal without reaching the merits of his claim under Rule 35(c). Pet. App. 2A.

ARGUMENT

1. Petitioner contends (Pet. 5) that he agreed to waive his appeal rights only with respect to the substantive issues in the indictment. He claims that the resentencing was an unforeseeable subsequent legal proceeding not contemplated by the plea agreement. That argument is precluded by the broad language of petitioner's appeal waiver. Petitioner cites no authority for the proposition that his agreement "to waive all rights to appeal" did not encompass the right to appeal an amended sentence. Plea Agreement ¶ 5.

The courts of appeals that have considered the validity of sentence appeal waivers have uniformly held that such waivers are valid so long as they are knowing and voluntary. See *United States* v. *Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995); *United States* v. *Attar*, 38 F.3d 727, 731 (4th Cir. 1994), cert. denied, 115 S. Ct. 1957 (1995); *United States* v. *Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993), cert. denied, 115 S. Ct. 652 (1994); *United States* v. *Melancon*, 972 F.2d 566, 567-568 (5th Cir. 1992); *United States* v. *Rivera*, 971 F.2d 876, 896 (2d Cir. 1992); *United States* v. *Rutan*, 956 F.2d 827, 829-830

(8th Cir. 1992); *United States* v. *Navarro-Botello*, 912 F.2d 318, 321-322 (9th Cir. 1990), cert. denied, 503 U.S. 942 (1992). Petitioner has not advanced a claim that his appeal waiver was either unknowing or involuntary.

2. Because petitioner waived all rights to appeal, the court of appeals did not reach the merits of petitioner's contention that the district court lacked power to correct his sentence after the time allowed in Fed. R. Crim. P. 35(c). Petitioner now argues that the court of appeals' failure to review the merits of his claim that the district court lacked jurisdiction violates his due process rights. Pet. 4-5. There is, however, no constitutional bar to petitioner's voluntary surrender of his statutory right to obtain appellate review of particular claims that he might have had in this case. See *United States* v. *Mezzanatto*, 115 S. Ct. 797, 801-802 (1995) (absent an "affirmative indication of Congress' intent to preclude waiver," statutory rights are "subject to waiver by voluntary agreement of the parties"; upholding defendant's waiver of rights under Fed. R. Evid. 410 and Fed. R. Crim. P. 11(e)(6)).

Petitioner argues that, by signing the plea agreement containing the waiver of all rights to appeal, he did not thereby waive his right to appeal with respect to future, "unforeseeable" legal proceedings. Pet. 5. Petitioner's inability to anticipate the specific grounds on which he might later wish to appeal, however, is not a reason to invalidate his waiver. See *Navarro-Botello*, 912 F.2d at 320 (fact that defendant did not know the nature of possible appeals when he signed plea agreement does not render agreement involuntary); *Rutan*, 956 F.2d at 830 (rejecting defendant's argument that he could not

waive an unknown right). Petitioner executed his waiver knowing that sentencing proceedings would follow, and he could readily foresee that procedural errors might occur in them. His waiver of all rights to appeal necessarily extended to such potential appellate issues.

The courts of appeals have recognized certain circumstances in which defendants who have signed waivers of rights to appeal retain the right to appellate review on limited grounds. See, *e.g.*, *Attar*, 38 F.3d at 732 (examining scope of waiver-of-appeal-rights provision). This case does not present any of those situations: Petitioner was not "sentenced entirely at the whim of the district court," or in excess of the maximum penalty provided by statute, *ibid.*; nor was a sentence imposed in violation of certain fundamental and immutable constitutional guarantees, *ibid.*; *Bushert*, 997 F.2d at 1350 n. 18; nor was a sentence imposed that violated the negotiated agreement, *Navarro-Botello*, 912 F.2d at 321; *Schmidt*, 47 F.3d at 190 (waiver would not prevent an appeal where sentence imposed is not in accordance with negotiated agreement); *Rutan*, 956 F.2d at 829-830 (same). Rather, petitioner was sentenced in precise accord with the terms of his plea agreement. Indeed, the applicable statutory mandatory minimum sentencing provision required the sentence he received.

In sum, because petitioner waived his right to appeal knowingly and voluntarily, and because there was no reason not to honor that waiver, the court of appeals correctly dismissed petitioner's appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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